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No. 61466-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL F. MORGAN, Individually and in his Official Capacity as Presiding Judge of the Municipal Court of Federal Way,

Appellant,

v.

CITY OF FEDERAL WAY, a code municipality; the CITY ATTORNEY FOR FEDERAL WAY; and TACOMA NEWS, INC. d/b/a THE NEWS TRIBUNE,

Respondents,

BRIEF OF RESPONDENT TACOMA NEWS, INC.

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

William E. Holt
James W. Beck
Attorneys for Tacoma News, Inc.

Suite 2100
1201 Pacific Avenue
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500
WSBA No. 01569
WSBA No. 34208

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A. INTRODUCTON

Tacoma News Inc. ("The News Tribune") requested, pursuant to the Public Records Act ("PRA"), a copy of the City of Federal Way's investigation into the working conditions at the municipal court. Appellant, Michael F. Morgan ("Morgan") serves as a Federal Way municipal court judge and was the focus of the investigation. Because the City of Federal Way ("City") determined that the completed investigation was subject to disclosure, the City notified Morgan that it was releasing the investigation. Although Morgan sought an injunction to permanently prevent the dissemination of this investigation, the trial court examined the document *in camera*, reviewed documents relevant to its creation, and determined that it was a document subject to the PRA, was not protected by the attorney-client privilege, was not protected by work-product doctrine, and that there was no exception authorizing the City to withhold the document. Morgan has appealed.

As is often the case, the manner in which a party frames an issue with the court can have a determinative effect on the outcome. This case is no different. Here, Morgan is attempting to recharacterize a relatively straightforward PRA dispute into a separation of powers struggle of constitutional proportion. In framing the issues as he has, Morgan attempts to create a case on appeal, which simply does not exist. The PRA controls this case, and the separation of powers doctrine is not implicated.

Perhaps Morgan could have prevented Amy Stephson from conducting her investigation, but he did not.

The News Tribune is not seeking to control the way in which the Federal Way municipal court treats its employees. The News Tribune is merely requesting a copy of an investigative report prepared at the request of the City, which is in the City's possession. Because Morgan fails to establish that a PRA exception applies and fails to establish any of the statutory requirements for injunction pursuant to RCW 42.56.540, this Court should affirm the decision below and allow the public to access this document at the earliest time possible.

B. ASSIGNMENTS OF ERROR

The News Tribune acknowledges Morgan's assignments of error as set forth in his brief at 5, but believes the issues pertaining to the assignments of error are more appropriately formulated as follows:

1. Where Morgan failed to establish (a) that an exemption to the PRA was applicable, (b) that disclosure was clearly not in the public interest, and (c) that disclosure would substantially and irreparably damage a person, or would substantially and irreparably damage vital governmental functions, did the trial court err in declining to grant Morgan an injunction under RCW 42.56.540?

2. Where Morgan failed to establish that any of the five requirements from *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d

716 (1982) were satisfied with regard to an email forwarded from Morgan to a City Councilmember, did the trial court abuse its discretion by declining to seal this exhibit?

C. STATEMENT OF THE CASE

Appellant Morgan serves as a Federal Way municipal court judge. CP 10. In the winter of 2007-2008, the City of Federal Way came under public scrutiny regarding how the City's municipal court was operating. In conducting its investigation into how the City was handling this situation, The News Tribune issued a public records request to the City. CP 19. [1] The City answered indicating that it intended to provide a copy of a report generated by investigator Amy Stephson (the "Stephson Report") as this document was responsive to The News Tribune's request and was not protected from disclosure. CP 279.

Neither The News Tribune nor its attorneys have seen the Stephson Report. However, it is clear that the report is an investigation into work place harassment. CP 37. It is also certain that Morgan's conduct is the focus of the report. *Id.* In fact, Morgan stated to the trial court that he "is the principle (if not sole) subject of the Stephson Investigative Report." *Id.*

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[1] The entire PRA request is not in the record; however, it is undisputed that the Stephson Report was responsive to the request.

Before releasing this document to The News Tribune, the City gave Morgan notice of its decision. *Id.* Specifically, on March 3, 2008, the City wrote Morgan's attorney explaining that the requested document must be disclosed. In relevant part, the City's letter to Morgan stated as follows:

> The overarching policy in the Public Records Act as codified in Title 42.56 of the RCW is disclosure of public records. The State Legislature expressly stated that the Public Records Act is to be construed liberally and that exceptions are to be construed narrowly. RCW 42.56.030. . . .
>
> It is also the City's position that the report is not exempt . . . as attorney work product. As the court analyzed in *Soter v. Cowles Publishing Company*, 174 P.3d 60 at 69 "the dominant purpose of the attorneys' investigation was to prepare to defend a claim." The purpose of Ms. Stephson's investigation was to gather facts in response to the allegation of a hostile work environment. . . . Ms. Stephson's report does not include legal analysis and recommendations. . . .

CP 278-79.

After learning that the City intended to release the Stephson Report, Morgan procured an *ex parte* temporary restraining order from the King County Superior Court preventing the City from disclosing the document as planned. CP 41. Morgan also filed a petition for protective order and a motion to show cause requesting that the trial court enter a permanent injunction pursuant to RCW 42.56.540. CP 3, 28.

The Honorable Kimberly Prochnau conducted a show cause hearing on March 19, 2008. RP (3/19/08 - I) at 1.[2] At the conclusion of this hearing, she denied Morgan's request for injunctive relief. RP (3/19/08 – II) at 2; CP 101.[3] The trial court determined that the Stephson Report was not protected by the attorney-client privilege, nor was it protected as work-product. On this point, the trial court ruled:

> The court concludes Ms. Stephson was not acting as an attorney for either the city or the court during the course of her investigation. Judge Morgan himself clearly treated her as an investigator and not an attorney when he rebuked her for her unsolicited advice on how to interact with employees during the investigation. The report also does not include any legal recommendations or conclusions, and while she may have given her opinions on the credibility of certain witnesses, those were not legal recommendations or conclusions. . . . [T]he court does not find that this report is attorney/client privilege or work product within the meaning of the PDA.

RP (3/19/08 – II) at 10-11.

The trial court also found that Morgan failed to demonstrate the requirements set forth in RCW 42.56.540 necessary for an injunction to issue. *Id.* at 16. On this question, the trial court held as follows:

> Finally, the court finds that 42.56.240 [sic] does not protect the Stephson report from public disclosure, as petitioner fails to show that the disclosure clearly would not be in the

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[2] The Reports of Proceeding for March 19, 2008 are divided into two transcripts. These transcripts are referred to as RP (3/19/08-I) for the argument portion and RP (3/19/08-II) for the portion starting with the trial court's ruling.

[3] Morgan also asked that the trial court disqualify the attorney for the City of Federal Way; and this request was granted without opposition. CP 104.

> public interest, would substantially and irreparably damage any person or substantially and irreparably damage vital government functions.

Id.

After the March 19, 2008 hearing, the trial court held a hearing regarding the sealing of various documents supporting the City's opposition memorandum. RP (3/28/08) at 1. There, the trial court determined that the Stephson Report and an email from Morgan to Stephson should be filed under seal until Morgan could request a stay from this Court. CP 133-36. Relevant to this appeal, the trial court also reviewed Exhibits 5 and 7 to the City Attorney's declaration (referred to hereafter as "Document 8" and "Document 10") and determined that there was no basis for sealing these records. *Id.*

Morgan filed a notice of appeal regarding the trial court's March 26, 2008 order denying his request for injunction. CP 106. Morgan later appealed the order mandating that the City file Documents 8 and 10 unsealed. CP 117.

After the notices of appeal were filed, on April 8, 2008, Morgan asked the trial court to reconsider its rulings. CP 231. Morgan's motion was denied. CP 384. Morgan then filed a notice of appeal on the order denying his motion for reconsideration. CP 358.

Once before this Court, Morgan filed a motion to stay the trial court's decisions. The News Tribune objected to a stay of the order on

sealing because continued protection of these documents hampered the paper's ability to brief the issues on appeal. This Court granted Morgan's stay.

The News Tribune asked this Court to consider this matter on an expedited basis as the filing deadline for Morgan's elected position is set for June 2009.[4] This Court granted The News Tribune's request.

D. SUMMARY OF ARGUMENT

The PRA controls the outcome of this case. The Stephson Report is a document prepared by and in the possession of a local agency. RCW 42.56.010. The News Tribune's PRA request was sent to the City, not the municipal court. CP 19. To support an injunction under RCW 42.56.540, Morgan must establish that an exemption to the PRA is applicable, that disclosure is clearly not in the public interest, and that disclosure would substantially and irreparably damage a person, or would substantially and irreparably damage vital governmental functions. Morgan did not meet any of these requirements.

First, the primary exemptions claimed by Morgan are attorney-client privilege and work-product.[5] These are not applicable because

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[4] Arguing that the courts should not allow Morgan to prevail on this case merely by invoking the delay inherent in the appellate process, The News Tribune also asked the Supreme Court to hear this appeal on direct review. The Supreme Court declined to consider this request until the opening briefs were filed by both parties.

[5] Apparently, as an afterthought, Morgan has also asserted on appeal a privilege based on RCW 42.56.230(2) dealing with personnel records. As is explained in Section E5, below, that exemption also does not apply.

Stephson was not acting as an attorney, the report does not contain legal opinions or advice, and the purpose of the investigation was to comply with the City's anti-discrimination policy and to prevent a lawsuit before it was filed. Thus, these claimed exemptions do not apply.

Second, Morgan cannot show that disclosure is against the public's interest. Morgan is the focus of this investigation and is an elected official. As an elected judge, he cannot make a credible argument that the public benefits from concealment regarding his official conduct.

Third, Morgan cannot establish that disclosure will irreparably harm a person or the public. Allegations were made about Morgan and the Stephson Report apparently confirmed these allegations. The only person that would be affected by disclosure is Morgan, an elected public official, because The News Tribune has agreed to have the name of the complaining employee redacted. Moreover, as the City has committed to disclosing the Stephson Report, the functioning of the government is not at risk. The electorate has a right to know how its government functions.

The requirements of RCW 42.56.540 are in the conjunctive. In other words, all three elements must be satisfied. Here, that has not occurred. Consequently, this Court should affirm, especially considering that withholding an investigation, paid for with public funds, into the conduct of an elected official is not in the public's interest.

E. ARGUMENT

1. Standard Of Review For Trial Court Decisions.

Decisions regarding an agency's compliance with the PRA are renewed de novo. RCW 42.56.550(3) ("Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo."). However, a trial court's decision on whether to seal a court record is reviewed for abuse of discretion. *Dreiling v. Jain,* 151 Wn.2d 900, 907, 93 P.3d 861, 866 (2004).

2. The Public Records Act Is Construed Broadly In Favor Of Open Government.

Washington courts have uniformly held that "the Washington public disclosure act is a strongly worded mandate for broad disclosure of public records." *Hearst v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). Consistent with its policy of broad disclosure, the PRA states that "[e]ach agency, in accordance with published rules, *shall make available for public inspection* and copying *all public records*, unless the record falls within [a] specific exemption . . . " RCW 42.56.070 (emphasis added). Simply stated, the policy behind the PRA is one of transparency, accountability of public officials and employees, and open government. In light of this general purpose, the PRA's own preamble subordinates certain individual privacy rights to the public good arising from "full access to information":

> . . . mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.

RCW 42.56.001 and RCW 42.56.010 (incorporating RCW 42.17.010 as reproduced above). Thus, it is clear that the People, in enacting the PRA, unambiguously intended a presumption in favor of disclosure. *Id.*

It is also well-settled that exemptions to the PRA are narrowly construed. *Hearst*, 90 Wn.2d at 126. In fact, the Washington Supreme Court regards this rule of narrow construction not as a mere guideline, but as a command:

> Declarations of policy requiring liberal construction are a command that the coverage of an act's provisions be liberally construed and that its exceptions be narrowly confined.

Id. (citing *Mead School Dist. 354 v. Mead Educ. Ass'n*, 85 Wn.2d 140, 145, 530 P.2d 302 (1975)). Accordingly, exemptions cannot be founded upon vague notions of privacy or embarrassment, but must instead be authorized by "clearly delineated statutory language." *Id.* Consistent with the PRA's general policy of full disclosure, the burden is on the party *resisting* disclosure to "establish that the information requested comes within a specific exemption." *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 35, 769 P.2d 283 (1989).

Moreover, there is no general right of privacy exemption to the PRA. In 1987, the law was amended to overturn a prior opinion, and in relevant part, the amended statute explains the purpose of the modification:

> The legislature intends to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court in *In re Request of Rosier*, 105 Wn.2d 606 (1986). The intent of this legislation is to make clear that (1) Absent statutory provisions to the contrary, agencies possessing records should in responding to requests for disclosure not make any distinctions in releasing or not releasing records based upon the identity of the person or agency which requested the records, and (2) agencies having public records should rely only upon statutory exemptions or prohibition for refusal to provide public records. . . .

Laws of 1987, ch. 403, § 1.

Each of these principles weigh heavily in favor of affirming the trial court's decision.

3. Morgan Cannot Establish The Statutory Requirements For An Injunction As Required by RCW 42.56.540.

Morgan did not explain to the trial court why he meets the statutory prerequisites required to support an injunction. Again, on appeal, Morgan generally ignores the requirements of showing that the disclosure is clearly not in the public's interest and would irreparably damage a person or vital government function. Morgan cannot succeed on appeal by downplaying these two requirements.

Washington law, RCW 42.56.540, provides as follows:

> The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would [1] clearly not be in the public interest and [2] would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. . . . .

(emphasis added).

Assuming *arguendo* that Morgan could establish that an exemption exists, which he cannot, a party seeking an injunction must also establish the two other requirements set forth in RCW 42.56.540. On this issue, there is no ground for argument as the Washington Supreme Court recently interpreted this statute and held that "to impose the injunction contemplated by RCW 42.56.540, the trial court must find that a specific exemption applies and that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest." *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007).

Morgan does not seriously address these issues, presumably because there is no credible argument to make. Appellant's Br. at 46. Disclosure of this report is certainly in the public interest as Morgan, an elected official, previously conceded that he is the focus of the report. CP 37. Furthermore, the disclosure will not damage a "vital government

interest." The City has agreed to produce the document and in reaching such a decision it has implied that disclosure would not damage the City's ability to govern. *See, e.g., Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 37, 769 P.2d 283, (1989) (holding that "[t]he agency's decision to voluntarily turn over these records . . . convinces us in this case that the nondisclosure of the records is not essential to effective law enforcement."). Because Morgan fails to explain how these requirements are satisfied, this Court should affirm the decision of the trial court.

4. There Is No Exemption To The Public Records Act For The Stephson Report.

The party seeking to withhold records or portions of records bears the burden of establishing that the records fall within the terms of a specific exemption. RCW 42.56.070(1). "[A]n agency refusing disclosure of public records has the burden of showing that an exemption applies[.]" *Lindberg v. Kitsap County*, 82 Wn. App. 566, 571, 919 P.2d 89 (1996), *rev'd on other grounds*, 133 Wn.2d 729 (1997).

Here, Morgan claims that the Stephson Report is exempt as it is protected by the attorney-client privilege and/or the work-product doctrine. Appellant's Br. at 15. Contrary to Morgan's assertion, both the trial court and the City have reviewed the Stephson Report and the documents related to the creation of the Stephson Report and concur that

these privileges do not apply. While The News Tribune has not had an opportunity to review these documents, it is evident from the information available that the Stephson Report was drafted to show that the City took prompt remedial action after learning of a complaint of unlawful conduct. The City explained this to Morgan in its letter of March 3, 2008 by stating "[a]s noted in *Burlington Industries v. Ellerth*, 524 U.S. 742, 754, 12 S. Ct. 2061 (2002), the best defense for the entity and the managers is to investigate allegations such as discrimination or hostile work environment and take prompt action if warranted." CP 279. In other words, the Stephson Report was intended as part of the *Faragher-Ellerth* Affirmative Defense, explained below, and was always intended to be disclosed. From the outset, the Stephson Report was intended to be released to third parties, and therefore, neither the attorney-client privilege nor the work-product doctrine applies. As explained in one of the leading treatises on privilege:

> To be privileged, a communication must be made with the intention of being kept confidential. The determinative factor is not whether it was in fact confidential, but the intention was when the communication was made. Thus, if the communication was made with the intention of being kept confidential and was not in fact kept confidential, a waiver has occurred. Conversely, if it was intended to be disclosed when made, then even if no disclosure has occurred, courts have said that the requisite confidentiality was lacking *ab initio*. This is but one small example of how the privilege does not reach as far, or protect half as

> much from compelled disclosure, as most practicing attorneys, erroneously, believe it does.

Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 171 (4th Ed. 2001).

Under both State and Federal discrimination laws, employers are liable for a hostile working environment created by a supervisor, unless the employer can establish an affirmative defense by showing that the employer took prompt action by investigating the situation and the employee failed to take advantage of the employer's anti-discrimination procedures. This defense is commonly known as the *Faragher-Ellerth* Affirmative Defense so named after the two United States Supreme Court cases establishing this legal principle. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). Washington Courts have also adopted and applied this affirmative defense for actions brought under Washington's Law Against Discrimination. *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 165, 991 P.2d 674 (2000). In practice, the *Faragher-Ellerth* Affirmative Defense is established by hiring an investigator, typically an attorney, to conduct an investigation into what occurred and then using that investigation to remedy problems or as proof of the prompt action by the employer. See, Daniel Blanchard, *The Faragher-Ellerth Affirmative Defense As Implied Waiver of Privileges: Is The Defense A Shield Or a Double-Edged Sword?*, 14 S. Carolina Lawyer 38, 41-42 (2003) (observing that "the

employer's use of the investigation to support its prompt remedial action defense impliedly waives any applicable privileges.") The investigation, the attorneys involved, and individuals who participated are all subject to discovery.[6] *Harding v. Dana Transp.*, 914 F. Supp. 1084, 1094 (D.N.J. 1996) (quoting *Giordano v. William Paterson College of New Jersey*, 804 F. Supp. 637, 641 (D.N.J. 1992)) ("When determining the adequacy and effectiveness of an employer's response to a hostile environment claim, courts have considered 'whether the employer investigated the alleged acts of harassment and the type of investigation the employer conducted.'"). In fact, when this affirmative defense is raised, the opposing party is entitled to depose the attorney conducting the investigation, even if that attorney is trial counsel for the employer. *Id.* at 187.[7]

The primary reason for conducting an investigation like the Stephson Report is to act on the information gained. This is exactly what

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[6] The Stephson Report is a work place remedial report and bears no resemblance to the investigation conducted into the child's death in *Soter*. *Soter*, 162 Wn.2d at 722-23. In *Soter*, there was no prompt investigation defense available for the wrongful death action.

[7] In *Harding*, two female employees brought claims against their employer for sexual harassment. 914 F. Supp. at 187. Before the lawsuit was filed, the employer hired an attorney from the same firm that later became its trial counsel in the subsequent lawsuit. *Id.* During discovery in the lawsuit, the plaintiffs' counsel noticed the depositions of this attorney and requested all investigative materials, including notes and correspondence to the employer. *Id.* at 1088. The employer filed for a protective order, invoking the attorney-client and work-product privileges in an attempt to avoid these disclosures. *Id.* The court was not persuaded by the employer's arguments and ordered the deposition to take place. Although the employer argued "that to depose their trial attorney would be intrusive and would undermine the adversarial process[,]" the court determined that "in cases where the attorney's conduct itself is the basis of a claim or defense, there is little doubt that the attorney may be examined as any other witness." *Id.* at 1102-1103 (internal quotations omitted).

the City did in this case. CP 279. By showing that the City is taking action by conducting a true investigation and then acting on the investigation, the employee will likely not file suit. While recognizing this general principle, Morgan argues that the work-product protection is only waived once litigation is started. However, he cites no support for such a contention. To the contrary, responsible entities will likely release the investigation to reassure an individual that the work environment will change or to deter a lawsuit against the entity by showing that the affirmative defense will apply if litigation ensues. In any case, when a document is created to avoid litigation, the work-product doctrine does not apply. Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 535 (4th Ed. 2001) ("If the motivation for the creation of a document was to assure a client's compliance with the law and thus the avoidance of litigation, courts have generally said that does not constitute 'in anticipation of' litigation.").

Beyond the *Faragher-Ellerth* Affirmative Defense, Morgan cannot show that the Stephson Report is privileged because Stephson was not acting as an attorney and the report does not contain legal advice. RP (3/19/08 II) at (10-11). "The attorney-client privilege protects only communications incident to the giving and receiving of legal advice, and incident to the representation of the client's legal interests." Karl B. Tegland, 5A *Washington Practice § 501.15.* Here, the trial court reviewed

the documents and determined that Stephson was not employed as an attorney. RP (3/19/08 II) at (10-11).

Through Morgan's own admission, he was the target of Stephson's investigation. In this context, the report is not protected by the attorney-client privilege or work-product doctrine. Because no exemption applies, this Court should affirm the decision below.

5. Morgan's Citation To The Recently Decided Case Of *Bellevue John Does 1-11 v. Bellevue School District #405* Is Misplaced.

On appeal, for the first time, Morgan claims that the Stephson Report is exempted under the employee's records exemption at RCW 42.56.230(2). Morgan did not cite this exemption to the court below apparently for the good reason that the Stephson Report is not a record contained within his employee file. Simply put, it is not an employee record. Even if the document was an employee record, numerous Washington cases establish that employee misconduct by an elected official is not exempt under this provision. Each point is taken in turn.

The starting point for this analysis is the statutory text. RCW 42.56.230(2) exempts from disclosure "[p]ersonal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy." Morgan does not claim that the Stephson Report is maintained

in his employment file. The threshold question under this exception is whether the document is normally maintained for the employee's benefit. *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 217, 951 P.2d 357 (1998) (holding that under this exemption "the focus is whether the requested file contains personal information that is normally maintained for the benefit of employees , disclosure of which would violate their right to privacy.") (internal quotations omitted). The Stephson Report was not conducted for the benefit of Morgan. Without seeing the report, this much is still clear. Because the Stephson Report is not in Morgan's employment file with the City and he has not established that it was maintained for his benefit, this exemption cannot apply as a threshold matter.

Even assuming that the Stephson Report does come within the scope of those documents requiring the balancing test of RCW 42.56.230(2), Morgan still does not establish that the document is exempt. In *Bellevue John Does 1-11 v. Bellevue School District #405*, __ Wn.2d __, 189 P.3d 139, 153 (2008), the court held that substantiated claims of sexual misconduct by teachers must be disclosed while unsubstantiated claims must be redacted to protect the identity of the innocent teacher. There, the court announced its holding as follows: "We hold a teacher's identity should be released under the PDA only when alleged sexual misconduct has been substantiated or when that teacher's conduct results in some form of discipline, even if only a reprimand." *Id.*

Here, the claims made by the City employee against Morgan are presumably substantiated by the investigation conducted by Stephson. Moreover, Morgan is not just any city employee, he is an elected city official. For Morgan to prove that his privacy rights justify the shielding of this report, the legal requirements are much greater as many Washington decisions establish. For instance, in *Columbian Pub. Co. v. City of Vancouver*, 36 Wn. App. 25, 29-30, 671 P.2d 280 (1983), the court ordered the city's chief of police to disclose complaints by his subordinate officers regarding his management style and his lack of respect for employees. There, the court reasoned:

> The statements entirely concern the chief's professional performance-his handling of various situations that have come before him as leader of the department, his methods in making transfers of duty and other personnel assignments, his handling of grievances, his allegedly poor relationships with other law enforcement agencies, his management style and demeanor towards certain employees and the like. To the extent that the complaints occasionally shade into personal habits, they are nonetheless relevant to an assessment of the chief's job performance. Disclosure of the statements might embarrass the chief but would not violate his right of privacy within the meaning of this exemption.

Id. Similarly, the court in *Spokane Research & Defense Fund v. City of Spokane*, 99 Wn. App. 452, 457, 994 P.2d 267 (2000) held that the city manager must disclose his own employment evaluations. The Court of Appeals explained:

> The position of Spokane City Manager is not like that of other public employees. The Spokane City Manager is the City's chief executive officer, its leader and a public figure. The performance of the City Manager's job is a legitimate subject of public interest and public debate. A person in the position of Spokane City Manager cannot reasonably expect that evaluations of the performance of his or her public duties will not be subject to public disclosure. Additionally, each year the Spokane City Council evaluates the job performance of the City Manager. In part, the purpose of that evaluation is to determine whether the employment of the City Manager should be continued. Because the City Council used this information in making its determination to retain the City Manager, there is a legitimate public interest in the information.

Id. This same analysis required the Pierce County Prosecuting Attorney's Office to produce performance evaluations regarding a deputy prosecutor when the request was focused on instances of misconduct. *Limstrom v. Ladenburg,* 85 Wn. App. 524, 533-34, 933 P.2d 1055 (1997), *rev'd on other grounds*, 136 Wn.2d 595 (1998). There, the court stated that "there is no doubt that the misconduct of a prosecutor in the performance of her duties is a matter of legitimate public concern." *Id. See also*, *Spokane Police Guild*, 112 Wn.2d at 39-40 (ordering the disclosure of an investigative report regarding the conduct of several police officers at a bachelor party, concluding that the activities were not highly offensive because the actions occurred on state property and in front of a number of individuals.). If the Vancouver Chief of Police, the Spokane City Manager, and a deputy prosecuting attorney are all required to produce documents related to misconduct because the public's interest in this

information outweighs an alleged right of privacy by the public official, then Morgan's claim of privacy is certainly unpersuasive.

6. The Separation Of Powers Doctrine Is Not Implicated By This Public Records Act Case Where The City Prepared The Document, Has The Document In Its Possession, And The PRA Request Was Directed To The City, Not The Court.

Morgan argues that the City should not disclose the Stephson Report because "it is a Municipal Court document and not subject to the PRA[.]" Br. at 15. Morgan's contention is incorrect. The City has this document and the City is subject to the PRA. This should end the discussion.

In any case, the document is the City's document, not the municipal court's document. In fact, neither Morgan nor the municipal court even have a complete copy of this report. Appellant's Br. at 10 n. 2. (Morgan first received a redacted copy of the Stephson report during this litigation and still does not have a non-redacted copy as Morgan does not know the identity of the complaining employee).

Furthermore, assuming *arguendo* that this document was created exclusively for the municipal court, when the document was transferred to the City, it became a document subject to the PRA. If Morgan believed that the City unlawfully had a copy of the Stephson Report, his obligation was to demand its return. He did not request this relief.

RCW 42.56.010(2) defines public records as those "prepared," "owned," "used" or "retained" by a local agency like the City of Federal Way. Even though this Court need only find one of these definitional characteristics met, in this case all four are satisfied with respect to the Stephson Report. The trial court was correct in determining that the PRA applies and this Court should therefore affirm.

7. The Supreme Court's Rules Of General Application Do Not Authorize The City To Withhold The Stephson Report.

Morgan works to frame this case as a separation of powers dispute, when it is not. It should be clear that Morgan takes this tactic because under the PRA the document must be disclosed. In support of this claim, Morgan asserts that "[t]he Stephson Report could only have been prepared for the benefit of the Municipal Court because the City had no authority or obligation to take any measures in response to the report." Appellant's Br. at 24.[8] Morgan's contention is not credible for three independent reasons: (1) the Stephson Report is simply a document; it does not remove the Court's authority to manage court employees; (2) regardless of whether or not the City had the authority to conduct an investigation, it did, and the resulting document is subject to disclosure; and (3) in fact, the City had both the authority and good reason to conduct an investigation.

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[8] In making this argument, Morgan first concedes that the City, not the municipal court, was responsible for preparing the report.

Morgan is correct that GR 29 provides the courts with authority to supervise court employees. However, this has no bearing on the issues presented in this PRA action because the Stephson Report does not take this authority away. Morgan has not established that the Stephson Report admonished or disciplined a court employee. Morgan has not established that the Stephson Report moved the control over municipal court employees from the court to the City. In fact, Morgan has not established that the Stephson Report required anyone at the municipal court to do anything whatsoever. Indeed, the Stephson Report is merely the summary and documentation of what the investigator did and learned. While GR 29 certainly places the responsibility with the courts to supervise employees, the Stephson Report does absolutely nothing to take this authority away. Morgan's application of GR 29 to this PRA matter is strained at best.

Even if this Court were to accept Morgan's argument that GR 29 prevents the City from conducting investigations, this still would not justify withholding the Stephson Report. The City did conduct an investigation. GR 29 does not contain any provision that preempts the PRA. By way of example, if the City had sent a letter to the municipal court clerk saying "you are fired, pack up your things and leave," GR 29 would presumably prevent the City from enforcing this demand. However, if a member of the public should request a copy of this letter, GR 29 does not provide a basis for withholding the document. Here, the

Stephson Report is no different. The document exists, regardless of whether or not the City should have created it, and GR 29 does not require its concealment.

Under Morgan's reading of GR 29, the Washington Human Rights Commission would be precluded from investigating an allegation of sexual harassment at the Court of Appeals. The Washington State Patrol would be restricted from responding to an assault between employees at the Washington Supreme Court. GR 29 does not place the courts above the law, and it certainly does not speak to what should happen with documents created by a City after an investigation into the court is complete. In truth, the City had both the authority and compelling reasons to conduct an investigation. Perhaps the City was concerned about its liability. Perhaps the City was concerned about whether it made sense to continue with a municipal court in light of the recent chaos.

Here, the City of Federal Way conducted an investigation and was legally authorized to do such. Even if the City was not, Morgan failed to prevent the investigation. The Stephson Report is a public record in the City's possession, and GR 29 does not contain any provision that would justify its nondisclosure.

8. If Morgan Prevails, The City Must Still Produce The Stephson Report In A Redacted Form.

The party seeking to withhold responsive documents must establish that redaction of information will not satisfy the relevant exemption. RCW 42.56.070(1) (stating "an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing."); *Prison Legal News, Inc., v. Department of Corrections*, 154 Wn.2d 628, 645, 115 P.3d 316 (2005) (holding that private health care information must be disclosed after personal identification information is redacted).

Morgan has not established that there is any exempt information contained in the Stephson Report. Even if there was exempt information contained in this document, Morgan has also failed to establish that this information cannot be redacted. For these reasons, even if this Court were to accept Morgan's contentions, the City must still produce the Stephson Report, redacting only that information which is exempt.

9. Because Morgan Has Abandoned His Appeal With Regard To Document 8, This Court Should Lift Its Stay.

Morgan appealed the trial court's ruling that the City file Document 8 unsealed. CP 117. Morgan then sought and received a stay from this Court on the unsealing of Document 8. Order (April 15, 2008). The News Tribune opposed Morgan's request for a stay because Morgan

was claiming that Document 8 was protected merely because the email was subsequently forwarded to an attorney. In his opening brief, Morgan is now abandoning his appeal regarding Document 8. Appellant's Br. at 13 ("Judge Morgan . . . is no longer challenging the unsealing of Document 8."). Because there is no basis for Document 8 to remain under seal, The News Tribune respectfully requests that this Court lift its stay at the earliest possible time.

10. The Trial Court Did Not Abuse Its Discretion In Ordering The City To File Document 10 Unsealed.

The Washington Constitution mandates that "[j]ustice in all cases shall be administered openly. . . ." Const. art. I, § 10. Our Supreme Court recently emphasized that "[t]he open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history. The right of the public, including the press, to access trials and court records may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified." *Dreiling*, 151 Wn.2d at 903-04. Moreover, "[o]pen access to government institutions is fundamental to a free and democratic society. Open access to the courts is grounded in our common law heritage and our national and state constitutions. For centuries publicity

has been a check on the misuse of both political and judicial power." *Id.* at 908. These concerns are even more important when the basis for the court's decision is not available for the public to scrutinize. *Dreiling*, 151 Wn.2d at 909-910 (holding "[s]ummary judgment effectively adjudicates the substantive rights of the parties, just like a full trial. . . . Such documents may not be kept from public view 'without some overriding interest' requiring secrecy.").

Although The News Tribune has not had an opportunity to view this document, it is undisputed that Document 10 is an email from Morgan "where he complained about Ms. Stephson providing him with unsolicited advice." CP 71, 239. It is also undisputed that Morgan forwarded this email to City of Federal Way councilmember Linda Kochmar at her personal email address. CP 239. Morgan claims that this email is protected by attorney-client privilege. The trial court reviewed this document, concluding that "[t]here is no basis for sealing this record." CP 135. Critical to this Court's analysis, Document 10 was submitted to the trial court and formed part of the basis for the court's decision.

Courts can only order the sealing of a document that forms the basis of a substantive decision if each of the five requirements from *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982) are present. These requirements are set forth below:

> 1. The proponent of closure and/or sealing must make some showing of the need therefor. . . . In demonstrating that need, the movant should state the interests or rights which give rise to that need as specifically as possible without endangering those interests. . . . Because courts are presumptively open, the burden of justification should rest on the parties seeking to infringe the public's right. . . .
>
> 2. Anyone present when the closure [and/or sealing] motion is made must be given an opportunity to object to the [suggested restriction]. . . .
>
> 3. The court, the proponents and the objectors should carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened. . . . If limitations on access are requested to protect the defendant's right to a fair trial, the objectors carry the burden of suggesting effective alternatives. If the endangered interests do not include the defendant's Sixth Amendment rights, that burden rests with the proponents.
>
> 4. The court must weigh the competing interests of the [parties] and the public, . . . and consider the alternative methods suggested. Its consideration of these issues should be articulated in its findings and conclusions, which should be as specific as possible rather than conclusory. . . .
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose . . . . If the order involves sealing of records, it shall apply for a specific time period with a burden on the proponent to come before the court at a time specified to justify continued sealing.

Dreiling, 151 Wn.2d at 913-14 (quotations and internal citations omitted).

Morgan's claim for sealing should fail because he does not establish a need for secrecy. The only possible need that might justify

sealing the record is if the document was protected by the attorney-client privilege. Here it is not.

Because the email was not sent for the purpose of seeking legal advice, the attorney-client privilege is inapplicable. "The attorney-client privilege is a narrow privilege and protects only communications and advice between attorney and client[.]" *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004). Moreover, assuming that the email was at one point protected, that protection was waived when Morgan forwarded the email to the councilmember.

> The attorney-client privilege only applies to communications that are intended by the party to be confidential. . . . Therefore, if the communication is intended to be disclosed to others, it is not protected by the attorney-client privilege.

Seattle Northwest Sec. Corp. v. Sdg Holding Co., 61 Wn. App. 725, 742, 812 P.2d 488 (1991) (citations omitted). *See also*, *In re Estate of Quick*, 161 Wash. 537, 549, 297 P. 198 (1931) ("The communication not being confidential the attorney is not privileged from disclosing it. Where there is no confidence reposed, no privilege can be asserted."). Morgan has supplied no legal citation to substantiate his claim that this document is privileged. To the contrary, under an analogous circumstance, the Sixth Circuit held that the privilege is waived. *See, e.g.*, *Reed v. Baxter*, 134 F.3d 351, 357-358 (6th Cir. 1998) (holding that attorney-client privilege did not cover discussions among the city's fire chief and city attorney

because two city councilmembers were present, not the full council, and their interests were different than that of the fire chief).

Even if this document was protected by the attorney-client privilege, that does not lead to sealing the file. Alternatives must be considered. One alternative is to simply reject the evidence because its need does not supplant the public's right to open justice.

The trial court did not abuse its discretion in declining to seal this email. The five *Ishikawa* factors are not met. Therefore, this Court should affirm the trial court and lift the stay sealing this court record from the public.

F. CONCLUSION

For the reasons set forth above, Respondent requests that this Court affirm the decision below.

DATED this 27th day of August, 2008.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

By _____
William E. Holt, WSBA No. 01569
James W. Beck, WSBA No. 34208
Attorneys for Respondent Tacoma
News, Inc.

CERTIFICATE OF SERVICE

I, Becky Niesen, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

A. I am a United States Citizen, over the age of 18 years, I am not a party to this cause, and am competent to testify to the matters set forth herein.

B. I am employed by the law firm of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, P.L.L.C., 1201 Pacific Avenue, Suite 2100, Tacoma, Washington 98401, attorneys for intervenor/respondent.

C. On August 27, 2008, I caused a copy of the attached to be served upon the following:

Clerk of the Court
COURT OF APPEALS – DIVISION I
One Union Square
600 University Street
Seattle, WA 98101-1176
[ ] U.S. Mail
[ ] Overnight Mail
[x] Messenger Service

Stephen Crane
Douglas Dunham
Crane Dunham PLLC
500 Fifth Avenue, Suite 4000
Seattle, WA 98104
[ ] U.S. Mail
[ ] Overnight Mail
[x] Messenger Service

John B. Schochet
Dorsey & Whitney LLP
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101
[ ] U.S. Mail
[ ] Overnight Mail
[x] Messenger Service

Ramsey E. Ramerman
P. Stephen DiJulio
Foster Pepper, PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299
[ ] U.S. Mail
[ ] Overnight Mail
[x] Messenger Service

Becky J. Niesen
Becky Niesen